United Nations A/CN.4/668

General Assembly

Distr.: General
27 February 2014

Original: English

International Law Commission
Sixty-sixth session
Geneva, 5 May-6 June and 7 July-8 August 2014

Seventh report on the protection of persons in the event of disasters

by Eduardo Valencia-Ospina, Special Rapporteur*

* The Special Rapporteur expresses his deep appreciation for assistance in the preparation of the present report to Giulio Bartolini (Assistant Professor of International Law, Department of Law, University Roma Tre, Italy), Federico Casolari (Assistant Professor of International Law, Department of Law, University of Bologna, Italy) and Emanuele Sommario (Assistant Professor of International Law Sant'Anna School of Advanced Studies of Pisa, Italy), to the "International Disaster Law Project", of which they are the local coordinators; to Lana Ulrich, J.D. candidate, George Washington University, School of Law, Washington, D.C.; Yann Dehaudt-Delville, L.L.M. and *Magistère de Droit*, the Sorbonne Law School, Paris 1, Panthéon-Sorbonne University, Paris, and L.L.M. candidate, Fordham University, School of Law, New York; and to Paul R. Walegur, The Hague, Netherlands.

14-24875 (E) 140314

Please recycle

Contents

		Page
I.	Consideration of the topic in 2013	3
II.	Protection of relief personnel and their equipment and goods	3
A.	Introduction	3
B.	Overview of legal provisions included in multilateral and bilateral treaties and soft-law instruments concerning the protection of disaster relief personnel and their equipment and goods	5
1.	Universal treaties	6
2.	Regional treaties	7
3.	Bilateral treaties	8
4.	Other instruments	9
C.	Categories of relevant relief personnel and their equipment and goods	10
D.	Measures to be adopted by affected States to fulfil their duty to protect relief personnel and their equipment and goods	14
E.	Proposal for an additional draft article	19
	Draft article 14 bis — Protection of relief personnel, equipment and goods	20
III.	General provisions	20
A.	Relationship with special rules of international law	20
1.	Universal treaties	21
2.	Regional treaties	22
3.	Other instruments	23
4.	Proposal for an additional draft article	25
	Draft article 17 — Relationship with special rules of international law	25
B.	Relationship with other rules of international law	26
	Proposal for an additional draft article	27
	Draft article 18 — Matters related to disaster situations not regulated by the present draft articles	27
C.	Relationship to the Charter of the United Nations	27
	Proposal for an additional draft article	28
	Draft article 19 — Relationship to the Charter of the United Nations	28

I. Consideration of the topic in 2013

1. In 2013, at the sixty-fifth session of the International Law Commission, the Special Rapporteur submitted his sixth report on the protection of persons in the event of disasters (A/CN.4/662). The report dealt with aspects of prevention, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. The report further provided an overview of relevant national policy and legislation. Proposals for the following two draft articles were made in the report: draft articles 5 ter (Cooperation for disaster risk reduction) and 16 (Duty to prevent).

2. The Commission considered the sixth report at its 3175th to 3180th meetings, from 8 to 16 July 2013, and referred the two draft articles to the Drafting Committee.

3. The Drafting Committee, in the light of the discussion held by the Commission in plenary meeting, provisionally adopted the following two additional draft articles: 5 ter (Cooperation for disaster risk reduction) and 16 (Duty to reduce the risk of disasters).

4. The Commission adopted the report of the Drafting Committee on draft articles 5 ter and 16, at the 3187th meeting, held on 26 July 2013. Earlier in the session, at the 3162nd meeting held on 10 May 2013, the Commission adopted the report of the Drafting Committee on draft articles 5 bis and 12 to 15, which had been considered and taken note of at the previous session in 2012.

5. At its 3190th and 3191st meetings, on 2 and 5 August 2013, the Commission adopted commentaries to draft articles 5 bis, 5 ter and 12 to 16. The seven draft articles, together with their respective commentaries were reproduced in chapter VI, C of the Commission's report on the work of its sixty-fifth session (A/68/10).

6. In November 2013, at the sixty-eighth session of the General Assembly, the Sixth Committee considered chapter VI of the Commission's annual report, devoted to the Special Rapporteur's sixth report and the debate of the Commission thereon, particular attention being given to draft articles 5 ter and 16 and their corresponding commentaries, as adopted by the Commission. A topical summary of the debate in the Sixth Committee has been prepared by the Secretariat at the request of the Assembly, in its resolution 68/112 (see A/CN.4/666, chap. II.C).

II. Protection of relief personnel and their equipment and goods

A. Introduction

7. International humanitarian missions are confronted with significant risks for the personnel involved in such operations. Statistics testify to a recurrence of episodes in the form of deliberate attacks, violence and theft, to the detriment of the personnel and assets belonging to these missions, as shown notably by the periodic reports of the Secretary-General on the safety and security of humanitarian personnel and protection of United Nations personnel[1] as well as by other

[1] See, for example, document A/68/489.

sources.[2] This phenomenon is most common in cases where international actors have to operate in situations of armed conflict or in States affected by a general deterioration of security conditions, owing mainly to political and economic causes.

8. In the light of draft article 3 and its commentary, the extent of application of the present set of draft articles might appear rather limited as regards the aforementioned scenarios, since the draft articles are not concerned with political or economic crises or armed conflict as events constituting a disaster per se.[3] Draft article 3 focuses on the existence of a calamitous event or series of events, whether natural or human-made, leading to one or more of three possible results: widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

9. Nonetheless, even in such situations, the possibility that relief personnel and their equipment and goods will face risks is real and cannot, therefore, be excluded. In fact, some past events have highlighted the relevance of security concerns in those scenarios as well. A disaster can lead to a temporary breakdown in law and order in the affected State, thus raising the security threats posed for disaster relief personnel. Besides, the considerable value of equipment and goods belonging to international actors engaged in relief operations represents a tempting target for common criminals. Similarly, in the often chaotic situations arising from such events, some individuals affected by disasters might be moved to arbitrarily take control of relief supplies, diverting them from the areas and primary needs identified by the competent authorities of the affected State with a view to guaranteeing a response in line with the principles recognized in draft article 6.

10. The situations thus envisaged can create additional hurdles for the efficient delivery of humanitarian aid and, as a result, undermine the efforts carried out by the affected State and international actors to provide support and recovery assistance for the population which has fallen victim to a calamitous event. Violence and attacks against civilian and military personnel providing external assistance, while detrimental to equipment and goods related to the international relief operation, have an immediate harmful impact on the victims of a specific disaster, thereby reducing the likelihood that their human rights (e.g., right to food, health, water, etc.) would be properly respected. From a long-term perspective, there is also a negative impact insofar as the result may be a reduction of the capacity and willingness of international actors to provide support in situations of disasters, thus weakening compliance with the duty to cooperate enshrined in draft article 5.

11. Besides, the specific duty to ensure the protection of personnel, equipment and goods attached to relief operations does not overlap with the parallel though distinct obligation embodied in draft article 14, namely, the facilitation of external assistance. According to draft article 14, the affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance and shall insure that its relevant legislation and regulations are readily accessible.

---

[2] See data available from https://aidworkersecurity.org/. See also resolution 5, entitled "Health care in danger: respecting and protecting health care", adopted at the Thirty-first International Conference of Red Cross and Red Crescent, 2011.

[3] See A/65/10, para. 331, para. (1) of the commentary to draft art. 3.

12. Nevertheless, even if the guarantee of protection towards civilian and military relief personnel as well as their goods and equipment might, broadly speaking, be assimilated to facilitation in favour of external actors, its specific nature and scope make it differ from the measures envisaged in draft article 14. As stated in the corresponding commentary, the purpose of draft article 14 "is to ensure that national law accommodates the provision of prompt and effective assistance".[4] The primary objective of this provision is, thus, to compel States to take the necessary and appropriate measures within their national law, which may include, inter alia, legislative, executive and administrative measures, to enable them to meet the legal challenges posed by incoming external assistance in the event of a disaster or in cases where they act as transit States for international relief operations. In this connection, a non-exhaustive list of the areas covered by the measures to be taken by States is included in the text of draft article 14 and its commentary (namely, (a) as far as relief personnel is concerned: privileges and immunities; visa and entry requirements; work permits; and freedom of movement; and (b) regarding goods and equipment: customs requirements and tariffs; taxation; transport; and disposal thereof), and States can certainly benefit from best practices developed in these areas to date.[5]

13. When considering the question of protecting relief personnel, equipment and goods, both the specific focus of concern and the kind of measures to be taken by the affected State can be differentiated. In such an instance, States are required to adopt a series of mainly affirmative measures aiming at achieving a specific goal: the safety and security of those individuals whose humanitarian actions constitute one of the fundamental pillars of international disaster relief. The main concern is not just for the affected State to guarantee the existence of a domestic legal order facilitating external assistance but for that State to endeavour to establish the appropriate security conditions required for the conduct of the relief operation, thus making it possible to guarantee the protection of personnel, equipment and goods.

B. Overview of legal provisions included in multilateral and bilateral treaties and soft-law instruments concerning the protection of disaster relief personnel and their equipment and goods

14. The necessity to maintain as distinct the obligations pertaining to the facilitation of external assistance, on the one hand, and those concerning the protection of relief personnel, equipment and goods, on the other, is clearly reflected in international practice. As evidenced in universal, regional and bilateral treaties as well as in soft-law instruments, there is a definite trend in favour of reflecting those obligations in a series of separate provisions. An overview of relevant international instruments makes it possible to better appreciate the widespread recognition of the need for a separate set of rules regarding this duty to protect and, consequently, the appropriateness of considering this aspect in the framework of the work carried out by the Commission on the present topic.

---

[4] See A/68/10, para. 62, para. (1) of the commentary to art. 14.

[5] See International Federation of Red Cross and Red Crescent Societies (IFRC), Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, March 2013, available from www.ifrc.org/docs/IDRL/MODEL%20ACT%20ENGLISH.pdf.

1. Universal treaties

15. With regard to multilateral treaties, the main conventions dealing with natural or human-made disasters have constantly included a specific reference to this additional obligation. A first mention to the duty to protect can be found in article 3(b) of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency of 1986,[6] which disposes that "The requesting Party ... shall ensure the protection of personnel, equipment and materials brought into its territory by, or on behalf of, the assisting Party for such a purpose". Additional provisions of the Convention detail privileges, immunities and facilities to be granted for the performance of the assistance functions.[7]

16. Subsequent universal treaties include similar provisions. Some instruments adopt a wording identical to that of article 3(b) of the 1986 Convention, for instance annex X, paragraph 2 to the Convention on the Transboundary Effects of Industrial Accidents of 1992,[8] or article 5(3) of the Tampere Convention of 1998,[9] according to which: "The requesting State Party shall ensure the protection of personnel, equipment and materials brought into its territory pursuant to this Convention". Similar terms have also been used in article 4(5) of the Framework Convention on Civil Defence Assistance of 2000,[10] which, in article 4(a), requires that in case of disaster "The Beneficiary State ... shall provide protection for personnel and for property belonging to the Civil Defence Unit of the Supporting State". Finally, mention must also be made of the Convention on the Safety of United Nations and Associated Personnel of 1994 and the Optional Protocol thereto of 2005, which could extend its application to operations delivering emergency humanitarian assistance, unless States parties have opted out in relation to missions conducted for the sole purpose of responding to a natural disaster.[11] Article 7(2) of the 1994 Convention provides that "States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out

---

[6] Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, of 26 September 1986, United Nations, *Treaty Series*, vol. 1457, No. 24643.

[7] See, for example, arts. 8 and 9.

[8] Convention on the Transboundary Effects of Industrial Accidents, of 17 March 1992, United Nations, *Treaty Series*, vol. 2105, No. 36605.

[9] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of 18 June 1998, United Nations, *Treaty Series*, vol. 2296, No. 40906.

[10] Framework Convention on Civil Defence Assistance, of 22 May 2000, United Nations, *Treaty Series*, vol. 2172, No. 38131.

[11] Convention on the Safety of United Nations and Associated Personnel, of 9 December 1994, United Nations, *Treaty Series*, vol. 2051, No. 35457, and Optional Protocol, of 8 December 2005 (General Assembly resolution 60/42, annex). See also paras. 47-49 below.

in article 9". Moreover, in case of complex emergencies, provisions formulated in the context of international humanitarian law could be of relevance in this respect.[12]

2. Regional treaties

17. Regional multilateral treaties include specific provisions to the same effect. In those cases it is possible to also recognize the influence of article 3(b) of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency of 1986 in the drafting of subsequent regional instruments. Several of those instruments tend to simply reproduce its content. In terms that are very close to those employed in article 3(b), those treaty provisions request the affected State "(to) ensure the protection of personnel, equipment and materials" brought into its territory for the purpose of providing external assistance. In this regard, mention can be made of the substantially identical provisions included in: article 16(5) of the Agreement Establishing the Caribbean Disaster Emergency Response Agency (CDERA) of 1991,[13] which reads: "The requesting State shall ensure the protection of personnel, equipment and materials brought into its territory for the purpose of rendering assistance in the event of a disaster"; article 12(2) of the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response of 2005,[14] reading: "The Requesting or Receiving Party ... shall also ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the Assisting Entity for such purposes"; and article IX (2) of the South Asian Associations for Regional Cooperation (SAARC) Agreement on Rapid Response to Natural Disasters of 2011,[15] according to which: "The Requesting Party shall provide, to the extent possible, local facilities and services for the proper and effective administration of the assistance. It shall also ensure the protection of personnel, equipment and material brought into its territory by or on behalf of the Assisting Party for such purposes".

18. Provisions having a similar aim have been included in other regional treaties such as the Inter-American Convention to Facilitate Disaster Assistance of 1991,[16] which, in article IV, directs the assisted State to "make its best efforts to protect personnel, equipment, and materials brought into its territory by or on behalf of the assisting State for such purpose" and in the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on

---

[12] Several international humanitarian law provisions could be relevant in this regard, such as: arts. 70(4) and 71(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), of 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512; art. 59 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 973. See also Rules 31 and 32 in *Customary International Humanitarian Law, Volume I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (Cambridge: International Committee of the Red Cross and Cambridge University Press, 2005), pp. 105-111.

[13] Agreement Establishing the Caribbean Disaster Emergency Response Agency, of 26 February 1991, available from www.caricom.org/jsp/secretariat/legal_instruments/agreement_cdera.jsp.

[14] ASEAN Agreement on Disaster Management and Emergency Response, of 26 July 2005, ASEAN Documents Series 2005, p. 157.

[15] SAARC Agreement on Rapid Response to Natural Disasters, 2011, available from www.ifrc.org/docs/idrl/N840EN.pdf.

[16] Inter-American Convention to Facilitate Disaster Assistance, of 7 June 1991 available from www.oas.org/juridico/english/treaties/a-54.html.

Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters of 1998,[17] article 8.4 of which provides that "The Requesting Party shall ensure security" for the members of the assistance teams.

3. Bilateral treaties

19. A large number of bilateral treaties concerning cooperation in the area of prevention and response to natural and man-made disasters contain very similar provisions, emphasizing the obligation to protect on the part of the States affected by a disaster. Common formulas have been used in most of those instruments. Thus, many such treaties include provisions according to which "The authorities of the Requesting State shall ... extend protection and assistance to the emergency teams or individuals dispatched to provide assistance from the Assisting State".[18] Mention can also be made of provisions requiring that "the Contracting Party requesting assistance shall ensure the safety of the relief teams and individual experts"[19] or, generally, referring to the necessity for the State affected by a disaster to ensure

---

[17] Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, of 15 April 1998.

[18] See: Agreement between the Republic of Austria and the Republic of Albania on Mutual Assistance in the Case of Disasters or Serious Accidents, of 27 January 2010, United Nations, *Treaty Series*, No. 48807, art. 9(3); Agreement between the Republic of Austria and the Swiss Confederation on the reciprocal assistance in cases of catastrophes or severe accidents, of 22 March 2000, United Nations, *Treaty Series*, vol. 2176, No. 38307, art. 9(3); Agreement between the Republic of Austria and the Czech Republic on Mutual Assistance in the Event of Disasters or Serious Accidents, of 14 December 1998, United Nations, *Treaty Series*, vol. 2137, No. 37267, art. 8(3); Agreement between the Republic of Austria and the Principality of Liechtenstein on Mutual Assistance in the Event of Disasters or Serious Accidents, of 23 September 1994, United Nations, *Treaty Series*, vol. 1901, No. 32390, art. 9(3); Agreement between the Republic of Austria and the Federal Republic of Germany Concerning Mutual Assistance in the Event of Disasters or Serious Accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 9(3); Agreement on reciprocal assistance in case of disasters or major accidents, France-Switzerland, of 14 January 1987, United Nations, *Treaty Series*, vol. 1541, No. 26743, art. 9(4); Agreement on Mutual Assistance in the Event of Disaster or Serious Accident, Denmark-Germany, of 16 May 1985, United Nations, *Treaty Series*, vol. 1523, No. 26375, art. 7(3); Convention on Mutual Assistance in Fighting Catastrophes and Accidents, Belgium-Netherlands, of 14 November 1984, United Nations, *Treaty Series*, vol. 1526, No. 26466, art. 5(3); Convention on Mutual Assistance in Case of Catastrophes or Serious Accidents, Belgium-France, 21 April 1981, United Nations, *Treaty Series*, vol. 1437, No. 24347, art. 7(3); and Convention on Mutual Assistance in the Event of Disasters or Serious Accidents, France-Germany, of 3 February 1977, United Nations, *Treaty Series*, vol. 1214, No. 19561, art. 7(2).

[19] Agreement between the Government of the Republic of Latvia and the Government of the Republic of Hungary on cooperation and mutual assistance in the event of disasters and other large-scale accidents, of 19 November 2003, United Nations, *Treaty Series*, vol. 2313, No. 41334, art. 5(5).

"security"[20] or "protection"[21] in favour of emergency teams or, alternatively, to "provide for their safety"[22] or to "ensure the security conditions needed for the conduct of their mission".[23]

20. Unlike multilateral treaties, whether universal or regional, referred to in paragraphs 15 to 18 above, bilateral treaties sometimes do not specifically refer to equipment and goods. However, it should be emphasized that equipment and goods related to international disaster relief operations are included within the sphere of application of the corresponding provisions. This conclusion is confirmed by an analysis of the articles dealing with definitions and terms of art used in such bilateral treaties. In this context, mention of "emergency teams" or "relief teams" is clearly intended to cover relevant relief equipment and goods. For example, article 2 of the Agreement between the Republic of Austria and the Republic of Albania on Mutual Assistance in the Case of Disasters or Serious Accidents of 2010, provides that "'Emergency teams' means specialized civilian or military units with appropriate equipment and emergency aid designated to provide assistance by the Assisting State".[24] This definition, reproduced in comparable terms in other treaties, implies that references made to the protection to be granted to the individual members of a relief mission encompass as well the equipment and goods attached to such mission. Relief personnel and their equipment and goods are inextricably linked, with the material elements playing an indisputable role in helping to guarantee a prompt and effective recovery for victims.

4. Other instruments

21. Finally, references to this duty to protect are also included in non-binding instruments. For example, the General Assembly, in its resolution 57/150, "urges all States to undertake measures to ensure the safety and security of international urban search and rescue teams operating in their territory", thus reaffirming the comparable provision already included in the United Nations Institute for Training

---

[20] Agreement between the Government of the Republic of Latvia and the Cabinet of Ministers of Ukraine on the cooperation in the field of prevention of disasters and elimination of their consequences, of 27 April 2006, United Nations, *Treaty Series*, vol. 2619, No. 46591, art. 6(4); Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on cooperation in the field of prevention and response to natural and man-made disasters, of 21 February 2000, art. 8 (available from www.ifrc.org/docs/idrl/I204EN.pdf).

[21] Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on mutual assistance in the case of disaster or serious accidents, of 13 March 2004, art. 8(3) (available from www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2005_III_119/COO_2026_100_2_211467.pdf); Agreement between France and the Russian Federation on Cooperation in the field of civil protection, prevention and management of emergency situations, of 18 October 1999, art. 8, in *Journal officiel de la République française*, n. 90, 15 April 2001, p. 5909 ff.; and Agreement on technical cooperation and mutual assistance in the field of civil defence, Spain-Morocco, of 21 January 1987, United Nations, *Treaty Series*, vol. 1717, No. 29861.

[22] Treaty between the Federal Republic of Germany and the Czech Republic concerning mutual assistance in the event of disasters or serious accidents, of 19 September 2000, United Nations, *Treaty Series*, vol. 2292, No. 40860, art. 9.

[23] Agreement between the Government of the Kingdom of Spain and the Government of the Russian Federation on cooperation in the field of prevention of natural disasters and mutual assistance in the mitigation of their outcome, of 14 June 2000, United Nations, *Treaty Series*, vol. 2153, No. 37586, art. 8(3).

[24] Agreement between the Republic of Austria and the Republic of Albania on Mutual Assistance in the Case of Disasters or Serious Accidents, of 27 January 2010, see footnote 18 above.

and Research (UNITAR) Model Rules for Disaster Relief Operations of 1982,[25] according to which "The receiving State shall take all necessary measures to ensure the security and safety of the designated relief personnel and of all premises, facilities, means of transport and equipment used in connection with relief activities".

22. Other non-binding instruments also acknowledge in concrete terms a similar, autonomous sphere of action of affected States. In this regard, mention can be made of paragraph 22 of the 2007 International Federation of Red Cross and Red Crescent Societies International Disaster Response Law (IDRL) Guidelines,[26] affirming that

> "Affected States should take appropriate measures to address the safety and security of disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations and of the premises, facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance".

23. The Institute of International Law has likewise recognized the principle as one that is strictly related to the legal framework pertaining to disaster situations, for instance in article VII(3) of its resolution on humanitarian assistance of 2003, according to which "The affected States shall ... ensure ... the protection of personnel, goods and services provided".[27]

24. The preceding survey justifies the conclusion that international practice confirms both the relevance and the autonomous character of the obligation of affected States to protect relief personnel and their equipment and goods.

C. Categories of relevant relief personnel and their equipment and goods

25. Some basic limitations are explicitly incorporated in the relevant treaties, for example, the requirement that relief personnel, equipment and goods will be considered as such only when they are so designated by the States parties to the treaty. However, provisions found in several of the above-mentioned treaties do not specifically include or exclude some other categories of humanitarian personnel who may become part of the relief effort coordinated by the affected State. Consequently, different groups of humanitarian personnel may be characterized as relevant in this context, such as civilian and military State personnel; the staff of international organizations; Red Cross and Red Crescent Movement personnel; and

---

[25] Model Rules for Disaster Relief Operations, 1982, *United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8* (United Nations publication, Sales No. E.82.XV.PE/8).

[26] See Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance, adopted at the Thirtieth International Conference of the Red Cross and Red Crescent, held in Geneva from 26 to 30 November 2007.

[27] Resolution on humanitarian assistance, adopted by the Institute of International Law at its Bruges Session, 2 September 2003, art. IX(2). See *Annuaire de l'institut de droit international*, vol. 70-I (2002-2003), pp. 399-576 and vol. 71-II (2004), pp. 133-250. See also para. 20 (c) of the Draft international guidelines for humanitarian assistance operations, elaborated by Peter MacAlister-Smith (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991).

personnel of non-governmental organizations, engaged as part of the relief assistance activities led by the State concerned.

26. The absence of specific exclusions cannot be interpreted as implying that any person or entity present in the territory of the affected State, with the aim of providing support in the relief efforts, could automatically qualify as being entitled to coverage under the provisions affording protection. Treaties constantly reaffirm a basic tenet of humanitarian assistance in the event of disasters, namely, the requirement to secure the consent of the affected State for the provision of external assistance and the primary role of that State in the direction, coordination and supervision of assistance and relief activities undertaken both by assisting States and non-State actors, including international organizations.

27. In that context, it is significant to note that a good number of the provisions concerning the duty to protect have been integrated, as autonomous paragraphs, within articles dealing with the coordination and management role of the affected State with regard to external assistance. For instance, the ASEAN Agreement of 2005, apart from reaffirming in its article 11(2) that assistance can only be deployed at the request, and with the consent, of the Requesting Party, disposes in its article 12(1) for the efficient modus operandi of the international relief operation. To that effect it requires, on the one hand, the receiving State to exercise the overall direction and supervision over assistance provided within its territory and, on the other hand, the assisting entity to appoint, in consultation with the affected State, a head of the assistance operation exercising immediate supervision over the foreign personnel and their equipment. In the immediately following article 12(2), the ASEAN Agreement provides that the requesting State shall ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the "Assisting Entity", a broad term of art intended to include States, international organizations, and any other entities or persons that offer and/or render assistance to a State party to the ASEAN Agreement in the event of a disaster emergency.[28] Similarly, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation emphasizes that no telecommunication assistance shall be provided without the consent of the requesting Party, and the right of that State to direct, control, coordinate and supervise telecommunication assistance, while accepting the United Nations Emergency Relief Coordinator to be the operation coordinator under the Convention.[29] At the same time, the Tampere Convention recognizes the right of the affected State to request telecommunication assistance directly from intergovernmental organizations and non-State entities, a term of art defined in its article 1(10) as including non-governmental organizations and the Red Cross and Red Crescent Movement. Consequently, the application of article 5(3) of the Tampere Convention, the provision dealing with the protection of personnel, equipment and goods involved in the international mission, may extend to cover all actors involved in the provision of telecommunication resources for disaster mitigation and relief operations.

---

[28] See ASEAN Agreement on Disaster Management and Emergency Response, art. 1(1), "'Assisting Entity' means a State, international organisation, and any other entity or person that offers and/or renders assistance to a Receiving Party or a Requesting Party in the event of a disaster emergency".

[29] See Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, arts. 2 and 4.

28. A similar approach is reflected in a series of multilateral international conventions framed within a similar structure. In particular, they stress the requirement for external actors to obtain the consent of the affected State in order to be able to provide assistance, as well as the primary coordination role of that State over international actors providing support and, finally, the duty of the affected State to ensure protection for disaster relief personnel and their equipment and goods. Reference can be made in this connection, for example, to: articles II and IV of the Inter-American Convention to Facilitate Disaster Assistance of 1991; articles 2 and 4 of the Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency of 1986; and articles III and IX of the SAARC Agreement on Rapid Response to Natural Disasters.

29. The goal of the obligation of protection embodied in the above-mentioned international treaties is to induce States to act with due diligence, making their best efforts to guarantee the safety and security of those humanitarian actors whose support has been accepted and is supervised by the governmental authorities of the affected State. As will be further discussed below, such a comprehensive approach is relevant for the proper fulfilment of the obligation. The local authorities are, in fact, best placed to evaluate the security risks that might be incurred by international relief personnel, to cooperate with them in dealing with safety issues and to coordinate the activities of external actors, taking into account those concerns. Moreover, they are the ones who can play the inherent primary role of providing a proper safety framework for the performance of relief activities.

30. The approach described above is in line with the set of draft articles on this topic, as adopted thus far, which are premised on the core international law principles of sovereignty and non-intervention. Mention can be made in this regard of draft article 11, which makes the provision of external assistance contingent upon a consent regime of the affected State. Mention can also be made of draft article 9, stressing that the affected State has the primary role in the direction, control, coordination and supervision of relief activities and assistance, in order to fulfil its duty to protect persons affected by disasters and provide relief assistance, in line with the international law principles and rules codified and developed by the Commission in the present draft. Seen from that perspective, therefore, the protection of disaster relief personnel, equipment and goods represents an additional key element to enable the affected State to fully comply with its primary obligation as prescribed by draft article 9.

31. To better identify, for the purposes of the current project, the scope of the duty to protect, attention has to be paid also to another of the provisions already adopted, notably draft article 12. This article makes reference to a series of actors (States, the United Nations, other intergovernmental organizations and relevant non-governmental organizations) which can play a complementary role in the response to disasters, offering their assistance by means of some of the forms of cooperation envisaged in draft article 5 bis. The action thus taken could result in making available relief personnel, relief equipment and supplies and scientific, medical and technical resources.

32. Accordingly, once the affected State has accepted offers of assistance submitted by the relevant external actors and is satisfied that those external entities, whether States or other, are capable of supporting their own relief effort, it shall endeavour to guarantee the protection of the relief personnel, equipment and goods

involved. Consequently, in the light of draft article 12, the relief personnel that would benefit from the insertion in the present set of draft articles of an express provision guaranteeing their protection may belong to either the civilian and military personnel of a State, or the staff of international organizations, or Red Cross and Red Crescent Movement personnel, or personnel attached to relevant non-governmental organizations.

33. The protection of goods and equipment belonging to those entities, which are to be used in connection with their participation in disaster relief and initial recovery assistance, is also relevant in this context. The term "equipment and materials", which is the term usually referred to in the relevant texts, should be interpreted in a broad manner as comprising those items that are necessary for the success of the operation at hand. In common usage, "equipment" describes the objects needed by relief personnel to enable them to effectively discharge their assistance function, for example, radios and vehicles, while the "materials", or other such term, denotes supplies intended for distribution to the victims of a disaster, to assist in their relief and initial recovery, as goods of prime necessity. For example, article 2 of the Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disaster or Serious Accidents of 2004[30] disposes that: "'Equipment' shall refer to materials, particularly technical facilities, means of transport and rescue dogs required for the task, and to goods used for own needs ... 'Relief items' shall refer to goods intended for delivery free-of-charge to the affected people living in the requesting State". Similarly, article 2 of the Agreement between the Government of the Republic of Latvia and the Government of the Republic of Hungary on cooperation and mutual assistance in the event of disasters and other large-scale accidents of 2003,[31] provides that: "For the purpose of the present Agreement, a term: 6) ... 'equipment' means materials, technical and transport facilities, medicines and medical equipment and individual kits of the members of the assistance team and/or experts; 7) 'goods of assistance' means material resources allocated for free distribution among the population affected by disasters". A reference to these objects is already reflected in subparagraph (b) of draft article 15(1) of the present draft, which mentions "goods and equipment" involved in the assistance operation. The term has been described in the respective commentary as encompassing "any and all supplies, tools, machines, foodstuffs, medicines, and other objects necessary for relief operations".[32] Logically, the objects thus included in the non-exhaustive list given in draft article 15(1)(b), could likewise be part of the field of application of an eventual draft article regarding the duty to protect relief personnel, equipment and goods. In order to maintain uniformity of language in the present draft, the Special Rapporteur has utilized throughout the term "goods and equipment", rather than the most common term "materials and equipment", employed in international treaties and documents dealing with this subject.

34. Even though standard treaty provisions dealing with this issue make reference to "equipment and materials brought into" the territory of the affected State, it has to be acknowledged that humanitarian actors may need to have recourse to the local market for the procurement of objects to be used in relief activities. Consequently,

[30] See footnote 21 above.

[31] See footnote 19 above.

[32] See A/68/10, para. 62, para. (5) of the commentary to draft art. 14.

independently from their origin, such equipment and goods also require the protection of the affected State.

D. Measures to be adopted by affected States to fulfil their duty to protect relief personnel and their equipment and goods

35. Measures to be adopted by affected States to fulfil their duty to protect relief personnel, their equipment and goods, may differ in content and can imply different forms of State conduct.

36. A preliminary requirement for States affected by a disaster is to respect the negative aspect of such an obligation, so as to prevent their State organs from being directly involved in pursuing detrimental activities with regard to relief personnel and their equipment and goods. In this sense, the obligation is one of result, with a clear content, although its fulfilment may be rather hypothetical, as it is to be expected that States affected by a disaster will act positively on their commitment to guarantee the safety of the international actors they have allowed to engage in relief activities in their territory.

37. The fulfilment of the obligation through the positive action to be inferred from the duty to protect, raises rather more complex issues. In particular, security risks for disaster relief personnel can be posed mainly by the activities of non-State actors aiming at benefiting from the volatile security conditions created by disasters, in order to obtain illicit gains from criminal activities undertaken against disaster relief personnel and their goods and equipment, or by deliberately engaging in harmful acts directed against them owing to the very fact that they form part of international missions.

38. In order to avoid detrimental activities of that kind carried out by individuals in their private capacity, affected States are required to show due diligence in taking the necessary preventive measures to endeavour to attain the objective sought by the international obligation. The duty to protect disaster relief personnel, goods and equipment can, therefore, be qualified as an obligation of conduct and not of result, thereby requiring States to act in a reasonably cautious and diligent manner to guarantee protection by attempting to avoid harmful events.

39. The characterization of this obligation as an obligation of conduct is confirmed by international instruments dealing with the duty to protect disaster relief personnel and their equipment and goods. Mention can be made in this connection of article IV (c) of the Inter-American Convention to Facilitate Disaster Assistance of 1991,[33] which requires the assisted State to "make its best efforts to protect personnel, equipment, and materials brought into its territory by or on behalf of the assisting state for such purpose". Similarly, the Convention on the Safety of United Nations and Associated Personnel of 1994[34] provides, in article 7(2), that "States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory" from a series of crimes envisaged in the Convention. Additional references may be found in bilateral treaties, such as article 2 of the

[33] See footnote 16 above.

[34] See footnote 11 above.

Agreement between the Swiss Agency for Development and Cooperation and the Ministry of the Russian Federation for Civil Defence, Emergencies and Elimination of Consequences of Natural Disasters on cooperation in the field of humanitarian rapid response to natural and man-made disasters and international development cooperation, of 21 September 2009,[35] according to which: "In case of need, the Parties shall give all possible support and due protection" to relief personnel and their goods and equipment. Other documents clearly emphasize the character of such provisions as obligations of conduct. For example, according to rule 17 of the UNITAR Model Rules, "The receiving State shall take all necessary measures to ensure the security and safety of the designated relief personnel and of all premises, facilities, means of transport and equipment used in connection with relief activities". In a similar vein, rule 22 of the International Federation of Red Cross and Red Crescent Societies IDRL Guidelines[36] makes reference to "appropriate measures to address the safety and security of disaster relief and initial recovery personnel ... and facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance".

40. Obligations of conduct require States to endeavour to attain the objective of the relevant obligation rather than succeed in achieving it. As stated by the International Court of Justice in the *Genocide* case, when qualifying the duty to prevent genocide as an obligation of conduct,

> "a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved".[37]

41. Measures to be taken by States in the realization of their best efforts to achieve the expected objective are, consequently, context-dependent. According to the International Court of Justice, "The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented".[38] Obligations of conduct leave States with a margin of appreciation on the measures to be adopted, as they are usually lacking in the precise indication of the means to achieve the result aimed at, taking into account the relevant circumstances. Thus, with regard to positive obligations related to the right to life, the European Court of Human Rights has held that

> "an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres. This consideration must be afforded even greater weight in the sphere of emergency relief".[39]

---

[35] United Nations, *Treaty Series*, vol. 2641, No. 47040.

[36] See footnote 26 above.

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports* 2007, p. 221, para. 430.

[38] Ibid., p. 220, para. 429.

[39] European Court of Human Rights, *Budayeva and Others v. Russia*, Judgment, 20 March 2008, p. 25, para. 135.

Similarly the International Court of Justice, in order to assess whether Nicaragua had breached its due diligence obligation to prevent the traffic, through its territory, of arms intended for El Salvador, took into account several circumstances such as the limited means at the disposal of the government, the intrinsic character of clandestine private illegal activities taking place in its territory and geographical obstacles present in the relevant areas.[40] These obligations may also assume a dynamic character according to the evolving situation, as has been affirmed by the Commission in respect of other areas of international law. For instance, in the commentary to the draft articles on prevention of transboundary harm from hazardous activities, 2001, the Commission stated that

> "What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future".[41]

With regard to disaster situations, a series of circumstances might be relevant to evaluate the appropriateness of the measures to be taken in the implementation of the duty to protect, such as difficulties for the State to perform its regular activities owing to the chaotic situation created by the disaster and the attitude and behaviour of the humanitarian actors involved in relief operations, as well as circumstances prevailing at the time that affect the relevant area of operations.

42. At the same time, it must be emphasized that security risks should be evaluated bearing in mind the comprehensive character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. As States are required to comply only with an obligation of conduct and not of result, the duty to protect should not be misinterpreted as entailing the creation of unreasonable and disproportionate hurdles for the relief activities carried out by relevant humanitarian actors. In this regard, attention must be paid to draft article 14 of the present draft, requiring States to adopt the measures necessary to facilitate the freedom of movement of relief personnel. As rightly acknowledged by the Commission in its commentary thereto, "Affected States can restrict access to certain sensitive areas while still allowing for freedom within the area concerned. Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance".[42]

43. Moreover, concerning the potential measures that might be adopted in this regard, it needs emphasizing that the possibility of using armed escorts in disaster relief operations should be evaluated according to the best practices developed in this area by the main humanitarian operational actors. In that respect, it merits paying particular attention to the Inter-Agency Standing Committee Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys of 2013, which are designated to assist relevant actors in making what is a very sensitive decision, with full consideration for humanitarian principles and the security of humanitarian operations. As explained under "II General Rule" in that document,

---

[40] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *I.C.J. Reports* 1986, pp. 73-74, paras. 155-157.

[41] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) (United Nations publication, Sales No. E.04.V.17 (Part 2)), para. 98, para. (11) of the commentary to draft art. 3.

[42] See A/68/10, para. 62, para. (4) of the commentary to draft art. 14.

> "as a general rule, humanitarian convoys will not use armed escorts. However, there may be exceptional circumstances in which the use of armed escorts is necessary as a 'last resort' to enable humanitarian action. Before deciding on such exceptions, the consequences and possible alternatives to the use of armed escorts shall be considered".[43]

This conclusion is even more warranted in view of the fact that security concerns prevailing in disaster situations are generally far less serious than those present in situations involving the provision of assistance in armed conflicts or other such high-risk scenarios.

44. In this context, it must be noted that a series of treaties dealing with assistance in the case of disaster tend to expressly exclude the possibility that foreign military personnel participating in the disaster relief effort provide security for other personnel involved in such activities, as this is a duty reserved for the military and police forces of the affected State.[44] This limitation can also be inferred from other treaty provisions requiring foreign military personnel serving in relief missions to act unarmed.[45] However, in the presence of the express consent genuinely manifested by the affected State, particularly when complying with a specific mandate given by competent international organs such as the Security Council, the possibility that actors different from the host government military and police force could also guarantee such protection to disaster relief personnel and their equipment and goods cannot be excluded for the purposes of the present set of draft articles. Consequently, this latter option can also be foreseen, provided that it accords with the principles and rules codified and developed to date.

45. Moreover, international humanitarian actors can themselves contribute to the realization of the goal sought, by adopting a series of mitigation measures geared to reducing their vulnerability to security threats. The duty of care by the relevant humanitarian actors towards their personnel deployed in dangerous international missions is clearly part of the general duties incumbent upon them. Suffice it to

---

[43] Inter-Agency Standing Committee Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys, of 27 February 2013, p. 3 (emphasis present in the original text), available from https://docs.unocha.org/sites/dms/Documents/Armed%20Escort%20Guidelines%20-%20Final.pdf.

[44] See Agreement between the Republic of Argentina and the Republic of Peru on Cooperation in relation to Disasters, of 11 June 2004, art. 7(2) (available from www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/119164/norma.htm). See also Agreement between the Republic of Argentina and the Republic of Chile on Cooperation in relation to Disasters, of 8 August 1997, art. 7(3).

[45] See art. 12(2) of the 2005 ASEAN Agreement on Disaster Management and Emergency Response; art. IX(2) of the 2011 SAARC Agreement on Rapid Response to Natural Disaster. See also: Council of Europe, Recommendation Rec(2002)3 of the Committee of Ministers to Member States on transfrontier cooperation in civil protection and mutual assistance in the event of natural and technological disasters occurring in frontier areas, para. 13, "should the emergency services include military or paramilitary units, the sending State should take care they intervene unarmed, subject to specific agreements with the requesting state, especially as regards the protection of the personnel and equipment dispatched"; Guidelines on The Use of Military and Civil Defence Assets in Disaster Relief — "Oslo Guidelines", Rev.1, 27 November 2006, para. 29 ("In principle, foreign military and civil defence personnel deploying on disaster relief missions will do so unarmed and in national uniforms. The overall responsibility for providing adequate security for authorized foreign MCDA support remains with the Affected State").

recall the position already adopted by the International Court of Justice in 1949 when it affirmed that

> "the Organization may find it necessary ... to entrust its agents with important missions to be performed in disturbed parts of the world ... Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection".[46]

Within the United Nations system, the consequential measures are to be taken primarily by the Secretary-General, as indicated in his bulletin of 2009 containing the United Nations Staff Regulations.[47] Under Regulation 1.2 (c):

> "Staff members are subject to the authority of the Secretary-General ... In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them".

Such an empowerment has been confirmed by several resolutions of the General Assembly on the safety and security of humanitarian personnel and the protection of United Nations personnel. For example, in its most recent resolution on the subject, the General Assembly requested the Secretary-General, among other things,

> "to continue to take the necessary measures to ensure that United Nations and other personnel ... are properly informed about and operate in conformity with the minimum operating security standards and relevant codes of conduct and are properly informed about the conditions under which they are called upon to operate and the standards that they are required to meet ... and that adequate training in security ... is provided so as to enhance their security and effectiveness in accomplishing their functions, and reaffirms the necessity for all other humanitarian organizations to provide their personnel with similar support".[48]

This duty of care, within the specific context of disaster relief operations, has also been reaffirmed by the International Federation of Red Cross and Red Crescent Societies IDRL Guidelines, rule 22 of which states that "Assisting States and assisting humanitarian organizations should also take appropriate steps in their own planning and operations to mitigate security risks".

46. In spite of any preventive measures that may be adopted by the relevant actors, harmful acts can still be committed against relief personnel, their equipment and goods. These unlawful activities should be prosecuted by the affected State exercising its inherent competence to repress crimes committed within its jurisdiction. As stated in the resolution on humanitarian assistance of 2003 of the Institute of International Law, in case of attacks against personnel, installations, goods or vehicles involved in a humanitarian assistance action "the accused person

---

[46] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports* 1949, p. 174.

[47] See Staff Regulations of the United Nations and provisional Staff Rules, Secretary-General's bulletin of 21 October 2009 (ST/SGB/2009/7).

[48] See General Assembly resolution 67/85, para. 16. A series of additional measures are also envisaged in paragraphs 19 to 36 of the resolution.

shall be brought to trial before a competent domestic or international court or tribunal".[49]

47. In this regard, a useful role might also be played for the States parties thereto by the Convention on the Safety of United Nations and Associated Personnel of 1994 and the Optional Protocol of 2005.[50] This treaty requires States parties to ensure the security and safety of categories of personnel identified in article 2 (a) and (b) and to repress specific crimes listed in the Convention, based on a prosecute or extradite approach. However, in order to give application to those provisions, United Nations and associated personnel must be involved in one of the missions identified in article 1 (c) of the Convention or in article II of the Optional Protocol. Article 1 (c) of the Convention reads as follows:

> "'United Nations operation' means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:
>
> > "(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or (ii) where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation."

48. Under the terms of the Convention of 1994, its applicability in favour of humanitarian relief personnel responding to a disaster is restricted by the requirement that the Security Council or the General Assembly make a declaration of exceptional risk. However, such declarations have never been adopted to date by either of the competent United Nations organs.

49. The Optional Protocol of 2005, in its article II, extends the application of the Convention, without the added requirement of a declaration of exceptional risk, to operations conducted for the purposes of "(a) delivering humanitarian, political or development assistance in peacebuilding, or (b) delivering emergency humanitarian assistance". While this latter scenario would be relevant for a series of missions conducted in the framework of disaster response, the host State is authorized under article II (3) of the Optional Protocol to make a declaration to the Secretary-General that it shall not apply its provisions with respect to "an operation under article II (1) (b) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation. Consequently, an affected State could make reference to the quoted clause relating to disaster response operations, in order not to apply the Optional Protocol and the Convention to the disaster event at hand. It must be stressed, however, that to date, the possibility thus offered to opt out, has never been utilized by States parties.

E. Proposal for an additional draft article

50. In the light of the foregoing, the Special Rapporteur concludes that the inclusion is warranted in the set of draft articles on protection of persons in the

[49] Resolution on humanitarian assistance, adopted by the Institute of International Law at its Bruges Session, 2 September 2003, art. IX(2), see footnote 27 above.

[50] See footnote 11 above.

event of disaster of an additional draft article concerning the protection of disaster relief personnel, equipment and goods. The proposed draft article, to be provisionally placed as draft article 14 bis, would read as follows:

Draft article 14 bis
Protection of relief personnel, equipment and goods

The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

III. General provisions

51. As in the case of drafts prepared by the Commission on other topics, the present draft should be completed by some general or saving clauses concerning its interaction with other rules of international law applicable in disaster situations. Such clauses may indeed contribute to further delimiting the scope of the draft articles.

A. Relationship with special rules of international law

52. In its memorandum of 2007 on the topic "Protection of persons in the event of disasters",[51] the Secretariat identified more than 200 international legal instruments touching upon various aspects of disaster prevention and response and being, more generally, relevant to the protection of individuals in disaster situations. Further relevant multilateral and bilateral treaties have been referenced in the six reports successively submitted since 2008 by the Special Rapporteur, notably in his sixth report.[52] Indeed, international cooperation in the provision of disaster relief assistance as well as in disaster preparedness, prevention and mitigation activities has become more prevalent in contemporary times, leading to a higher normative density in this area. Moreover, several specialized fields of international law must be taken into account in assessing the exact scope of the rights and duties of States and of other actors in relation with the prevention and management of disasters.[53] Hence the need for a provision aimed at harmonizing the present draft articles with other rules of international law.

53. To seek guidance in devising such a provision it is necessary to examine existing instruments which — as the present draft articles do — address issues of

[51] A/CN.4/590/Add.2.

[52] See A/CN.4/662, sect. II.C. An updated database of relevant instruments is maintained by the International Federation of Red Cross and Red Crescent Societies and can be consulted at www.ifrc.org/en/publications-and-reports/idrl-database/. See also Andrea de Guttry, "Surveying the law", Andrea de Guttry, Marco Gestri and Gabriella Venturini, eds., *International Disaster Response Law* (The Hague, T.M.C. Asser Press, 2012), pp. 3-44.

[53] For a comprehensive survey of the different areas of international law involved, see David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007), pp. 33-82. See also Gabriella Venturini, "International disaster response law in relation to other branches of international law", Andrea de Guttry, Marco Gestri and Gabriella Venturini, eds., *International Disaster Response Law*, pp. 45-64.

disaster prevention and response from a general perspective. Such instruments normally deal with a wide range of issues, thus having the potential to generate dissonances with other, more specialized norms of international law. For the sake of completeness, the present survey will also include soft-law instruments and other documents developed and adopted by authoritative bodies.

1. Universal treaties

54. Turning first to universal treaties, there are currently two sectorial instruments in force containing general norms aimed at regulating the provision of international humanitarian assistance: the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998;[54] and the 2000 Framework Convention on Civil Defence Assistance.[55]

55. While dealing exclusively with the provision of telecommunication assistance, the Tampere Convention lays down rules on a number of aspects relevant to the activities of foreign relief actors (consent, privileges and immunities, termination of assistance, costs, regulatory barriers, etc.). To address possible tensions with other norms of international law, a provision was included establishing that the Convention "shall not affect the rights and obligations of States Parties deriving from other international agreements or international law".[56]

56. The Framework Convention on Civil Defence Assistance aims to promote cooperation among State civil defence authorities "in terms of prevention, forecasting, preparedness, intervention and post-crisis management"[57] by setting out the principles according to which all assistance operations should be conducted. When describing its relation with other international norms, the Convention establishes that it "does not affect other obligations held by the States Parties under International Law".[58]

57. Other treaties open to universal participation are designed to comprehensively regulate the rights and obligations of States parties in preventing and addressing emergency situations caused by specific human activities.[59] It is, therefore, appropriate to include them in the present survey.

58. Among them there is the International Convention on Oil Pollution Preparedness, Response and Cooperation of 1990,[60] which lays down detailed obligations to ensure that prompt and effective action is taken to minimize the damage which may result from such incidents. Article 10 of the Convention reads:

> "Nothing in this Convention shall be construed as altering the rights or obligations of any Party under any other convention or international agreement".

---

[54] See footnote 9 above.

[55] See footnote 10 above.

[56] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, art. 10, see footnote 9 above.

[57] Framework Convention on Civil Defence Assistance, preamble, see footnote 10 above.

[58] Ibid., art. 5.

[59] For an extensive list, see A/CN.4/590, para. 46, and A/CN.4/590/Add.2.

[60] International Convention on Oil Pollution Preparedness, Response and Cooperation, of 30 November 1990, United Nations, *Treaty Series*, vol. 1891, No. 32194.

An identical provision is contained in the Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances of 2000.[61]

59. Similarly, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[62] provides, in article 12, that:

> "This Convention shall not affect the reciprocal rights and obligations of States Parties under existing international agreements which relate to the matters covered by this Convention, or under future international agreements concluded in accordance with the object and purpose of this Convention".

2. Regional treaties

60. Several regional instruments likewise cover issues dealt with in the present draft articles, and have a similar field of application, both *ratione materiae* and *ratione temporis*. Most of those documents contain clauses that regulate their relationship with other treaties and/or with other rules of general international law having the same scope.

61. The 1998 Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, stipulates that the treaty "shall not affect the rights and obligations of the Parties laid down in other international agreements".[63]

62. One of the most recent and comprehensive treaties adopted at a regional level is the 2005 ASEAN Agreement on Disaster Management and Emergency Response.[64] The treaty, "which reflects much of contemporary thinking in terms of disaster mitigation and risk reduction",[65] is of a general nature, covering a wide range of issues. According to one of its clauses, its provisions "shall in no way affect the rights and obligations of any Party with regard to any existing treaty, convention or instrument to which they are Parties".[66]

63. The most recent regional agreement concerning external assistance in disaster situations is the Agreement on Rapid Response to Natural Disasters of 2011, concluded between the members of SAARC. The objective of the treaty is "to provide effective regional mechanisms for rapid response to disasters to achieve substantial reduction of disaster losses in lives and in the social, economic and environmental assets of the parties, and to jointly respond to disaster emergencies through concerted national efforts and intensified regional cooperation",[67] and its provisions cover many different activities related to disaster response. Article XVII of the Agreement reads:

---

[61] Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances, of 15 March 2000, art. 9.

[62] See footnote 6 above

[63] Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, art. 22, see footnote 17 above.

[64] ASEAN Agreement on Disaster Management and Emergency Response, see footnote 14 above.

[65] See A/CN.4/598, para. 34.

[66] ASEAN Agreement on Disaster Management and Emergency Response, art. 30, see footnote 14 above.

[67] SAARC Agreement on Rapid Response to Natural Disasters, art. II, see footnote 15 above.

"This Agreement shall not affect the rights and obligations of the Parties under other bilateral or multilateral Treaties, Conventions and Agreements to which they are a Party".

64. A different approach is taken in the Inter-American Convention to Facilitate Disaster Assistance of 1991, which stipulates that:

"If there is any discrepancy between this Convention and other international agreements on the subject to which the assisting and assisted states are parties, the provision that affords the greatest degree of assistance in the event of disaster and favours support and protection to personnel providing assistance shall take precedence".[68]

3. Other instruments

65. Another significant text is the draft convention on expediting the delivery of emergency assistance, which was developed in the early 1980s at the initiative of the United Nations Disaster Relief Coordinator[69] and contains provisions akin to those of the present draft articles. Article 29 ("Application of other agreements on emergency assistance") reads:

"1. This Convention is without prejudice to the applicability of other agreements concluded by a Party before its entry into force.

"2. The entry into force of this Convention shall not prevent a Party from subsequently concluding other agreements on emergency assistance provided that the rights and obligations of the other States and organizations applying the provisions of this Convention are not affected".

66. Also of interest to the present survey is the resolution on humanitarian assistance adopted by the Institute of International Law in 2003.[70] In common with the present draft articles, the resolution is intended to offer general guidance on the rights and duties of States in situations of natural or human-made disasters. The relationship between the resolution and other rules of international law is laid out in article X:

"This Resolution is without prejudice to the:

"a) principles and rules of international humanitarian law applicable in armed conflict, in particular the 1949 Geneva Conventions for the Protection of War Victims and the 1977 Additional Protocols;[71] and,

"b) rules of international law regulating humanitarian assistance in specific situations".

67. The foregoing brief survey suggests that whenever States and expert bodies proceeded to regulate the relationship between, on the one hand, a disaster-related instrument with a broad scope of application and addressing multiple issues, and on the other hand, treaties or other rules of international law having a more specific

[68] Inter-American Convention to Facilitate Disaster Assistance, art. 10, see footnote 16 above.

[69] See A/39/267/Add.2-E/1984/96/Add.2. The Economic and Social Council, to which it was submitted, decided not to take further action on the initiative.

[70] See footnote 49 above.

[71] It should be noted that the resolution also includes armed conflicts within its definition of "disaster" (art. I).

focus, the prevalent solution has been to confer primacy to the latter category of norms.

68. Such an option is probably the one more in line with the purpose of the present draft articles, as set out in draft article 2, namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect of their rights". Since many of the provisions already included in the present draft set out general rules concerning international cooperation in the event of a disaster, it would be incongruous to endow them with a precedence value, over more specific rules appearing in (existing or future) bilateral or multilateral treaties. As both those categories of treaties usually spell out the obligations for the States parties, their application would, therefore, better serve the interests of the persons affected by a disaster. Obviously, it should not be expected that States will conclude bilateral or multilateral agreements containing provisions at odds with the general principles of international law enshrined in the present draft articles.

69. The approach described above has the merit of preserving the stricter standards that may have been established by means of specialized agreements, so that no conflict will exist between the present draft articles and the treaties that set such standards. The same approach would also regulate potential conflicts between the present draft articles and norms of customary law with a like scope. Nevertheless, it must be stressed that the application of such special norms cannot displace the applicability of the present draft articles inasmuch as these cover matters that are not addressed in said norms.[72]

70. In this connection, it must be recalled that the Commission has already addressed the issue of the relationship between the rules enshrined in the present project and a special branch of international law, when it dealt in draft article 4 of the present draft with the possible interaction between the draft articles and international humanitarian law. As provided in draft article 4: "The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable". In its commentary to draft article 4, the Commission has highlighted the fact that in situations of armed conflict, the rules of international humanitarian law should be given precedence over those contained in the present draft articles, thereby endorsing the commonly accepted view that international humanitarian law represents the special law applicable during armed conflicts.[73]

71. The foregoing notwithstanding, the Commission has also emphasized in the same commentary that draft article 4 should not be interpreted as warranting a blank exclusion of the applicability of the present draft articles during armed conflicts unfolding on a territory struck by a disaster, as such an exclusion "would be detrimental to the protection of the victims of the disaster".[74] The commentary goes on to explain that

---

[72] On the relationship between general and special rules of international law see the Commission's Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), para. 251.

[73] See A/65/10, para. 331.

[74] Ibid.

> "[w]hile the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply."[75]

Hence, while prevalence is given to international humanitarian law as the special body of laws applicable in armed conflict situations, the concurrent applicability of the present draft articles is preserved.

4. Proposal for an additional draft article

72. In the light of the foregoing, the inclusion of the following draft article is proposed:

> **Draft article 17**
> **Relationship with special rules of international law**
>
> The present draft articles do not apply to the extent that they are inconsistent with special rules of international law applicable in disaster situations.

73. Such a wording is to be preferred to a "without prejudice" clause, because it better captures the residual nature of the draft articles in relation to special rules of international law, and because it is more in line with the wording of similar provisions recently adopted by the Commission, for example, article 17 of its draft articles on diplomatic protection,[76] which reads as follows:

> "Special rules of international law
>
> "The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments."

74. Given the logical proximity existing between the proposed draft article 17 and draft article 4, it is suggested that the latter be moved and included among the draft's general provisions.

---

[75] Ibid. Indeed, the residual applicability of the draft articles to armed conflict situations appears apposite as the rules of international humanitarian law concerning humanitarian assistance — while well developed — present certain gaps which other rules and principles of international law could contribute to address. See, e.g., Daniela Gavshon, "The applicability of IHL in mixed situations of disaster and conflict", *Journal of Conflict and Security Law*, 2009, vol. 14, pp. 243-263. The concurrent application of international humanitarian law and other branches of international law has been strongly reaffirmed, with respect to human rights law, by the International Court of Justice in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, 2004, p. 178, para. 106. The principle has also been recognized by the Commission in its recent work on the effects of armed conflicts on treaties, which takes as its starting point the presumption that the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties. See A/66/10, para. 100, draft articles on the effects of armed conflicts on treaties, art. 3.

[76] See A/61/10, para. 49. See also art. 55 of the 2001 draft articles on responsibility of States for internationally wrongful acts; and art. 64 of the 2011 draft articles on the responsibility of international organizations.

B. Relationship with other rules of international law

75. After having considered the interaction between the present draft articles and different types of special rules of international law applicable to disaster situations, and bearing in mind the related proposal for inclusion in the present draft of a clause governing such interaction, it becomes appropriate to consider what other saving clauses might properly be inserted in the text. For the sake of clarity, the inquiry should extend to the question whether or not the general provisions that will complete the current draft should also deal with its relationship with other international norms covering matters not regulated by the present draft articles. In this respect, it would seem useful to include a general clause stating that applicable rules of international law continue to govern legal questions that might assume relevance in disaster situations. In this sense, such a provision is intended to complement the preceding clause (art. 17): while the latter is geared to establishing a normative priority for any special rules in the field of application of the current draft, the former would seek to ensure a parallel application of international rules having a different scope. Although doing it this way may appear prima facie superfluous, even obvious, the purpose of such a provision is at least twofold.

76. First, the insertion of such a clause would contribute to shed light on the interaction between the draft articles and customary international law applicable in disaster situations. In his preliminary report, the Special Rapporteur has noted that the topic "seems in principle to be the subject of progressive development".[77] This perception notwithstanding, some interactions between customary international norms and the present draft articles have been highlighted by the Special Rapporteur in subsequent reports,[78] for instance, with regard to the right of the affected State to oversee disaster response, its duty to seek assistance, and the duty to prevent.[79] Moreover, it cannot be overlooked that other customary international norms, having a different field of application, might interact with the draft's provisions. The proposed clause would then contribute to making clear that the content of the draft articles leaves the application of customary international law on matters not covered by the current draft unaffected, while pointing out that the present draft articles do not preclude the further development of customary international norms in the field of disaster management. In this respect, the clause replicates the content of the preambular paragraph of the Vienna Convention on the Law of Treaties of 1969, which states that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention", as well as the wording of other provisions contained in draft articles adopted by the Commission, namely, article 56 on the responsibility of States for internationally wrongful acts and article 65 on the responsibility of international organizations. Article 56 of the draft articles on State responsibility reads as follows:

---

[77] See A/CN.4/615, para. 42.

[78] See the third report (A/CN.4/629, para. 82), the fourth report (A/CN.4/643, paras. 40 et seq.), and the sixth report (A/CN.4/662), respectively.

[79] For the impact of international customary law on the topic see Natalino Ronzitti, "Conclusions", Andrea de Guttry, Marco Gestri and Gabriella Venturini, eds., *International Disaster Response Law* (The Hague, T.M.C. Asser Press, 2012), pp. 703-706.

"Questions of State responsibility not regulated by these articles

"The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles."[80]

77. Secondly, the proposed clause also would seek to clarify that the present draft articles do not interfere with treaty law having a different scope. As explained by the Special Rapporteur and the Commission itself, the content of the present draft reflects an approach essentially focused on the needs and concerns of individuals, as well as on their legal rights in the context of disasters.[81] It follows that the draft articles do not address all the questions of international law that may be brought to play when a disaster occurs. Examples of other international law regimes that may complement the content of the draft articles in the event of disasters include, among other things, the provisions concerning the law of treaties, in particular, those related to the supervening impossibility of performance and the fundamental change of circumstances,[82] as well as the rules on the responsibility of both international organizations and States, and the responsibility of individuals.

Proposal for an additional draft article

78. In the light of the foregoing, the following text for a draft article concerning the interaction with other applicable rules of international law, may be proposed:

Draft article 18
Matters related to disaster situations not regulated by the present draft articles

The applicable rules of international law continue to govern matters related to disaster situations to the extent that they are not regulated by the present draft articles.

C. Relationship to the Charter of the United Nations

79. Among the general provisions of the current draft, a specific clause related to the interaction with the obligations under the Charter of the United Nations may also be usefully included. Its text needs to be worded in the light of Article 103 of the Charter, according to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

80. The primacy of the obligations under the Charter has already been invoked during the Commission's work on the topic. In particular, the Commission has highlighted the cardinal role played by some principles enshrined in the Charter — namely, the principles of sovereign equality of States, non-intervention, cooperation and non-discrimination — in defining the rights and duties of States in the event of

[80] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) (United Nations publication, Sales No. E.04.V.17 (Part 2)), para. 77.

[81] See A/64/10, para. 178.

[82] Vienna Convention on the Law of Treaties, 1969, arts. 61 and 62, respectively.

disasters.[83] It also bears mentioning that a like emphasis on the respect of Charter principles is to be observed in some international instruments adopted *in subiecta materia*. In the context of disaster relief, for example, the General Assembly, in its resolution 46/182, states that "the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations".[84] In a similar vein, the ASEAN Agreement on Disaster Management and Emergency Response of 2005 recognizes that the "sovereignty, territorial integrity and national unity of the Parties shall be respected in accordance with the Charter of the United Nations".[85] A similar approach governs the European Union action in disaster management, which shall be exercised as far as it is compatible with the obligations under the Charter. This conclusion emerges from article 21(1) of the Treaty on the European Union, which mentions the principles of the Charter of the United Nations among those inspiring the European Union development deserving of respect. Even if that provision does not make a direct reference to the European Union disaster management, it is nonetheless evident that European Union action in this area is subject to the respect of the Charter, insofar as it represents a development of the European integration process.

81. Furthermore, the inclusion in the current draft of a clause reaffirming the primacy of Charter obligations might contribute to strengthen the leading role played by the United Nations in disaster management. That role has already been acknowledged in the draft by the wording of draft articles that properly differentiate the position of the Organization from that of other international organizations and actors involved in disaster situations,[86] and has been expressly recognized in other international instruments.[87]

Proposal for an additional draft article

82. For the above reasons, the Special Rapporteur proposes that the general provisions of the current draft also include a draft article on the interaction with the Charter of the United Nations, reading as follows:

Draft article 19
Relationship to the Charter of the United Nations

The present draft articles are without prejudice to the Charter of the United Nations.

---

[83] See, inter alia, third report (A/CN.4/629), paras. 64 et seq., and A/65/10, para. 331, commentary to draft art. 5.

[84] General Assembly resolution 46/182, annex, para. 3.

[85] See footnote 14 above, art. 3.1.

[86] See arts. 5, 10, 12. On the cooperation duties of States, see also A/64/10, para. 183.

[87] Cf., inter alia, the North Atlantic Treaty Organization Euro-Atlantic Partnership Council Policy of 1998 on enhanced practical cooperation in the field of international disaster relief (art. 2.2.2) and, at European Union level, the Decision No. 1313/2013/EU on a Union Civil Protection Mechanism (Recital No. 14 and arts. 5(2), 13(3), 16(1) and 16(2); *Official Journal of the European Union* L 347, 20 December 2013, p. 924 et seq.).